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In the Supreme Court of the United States

OCTOBER TERM, 1977

REYNOLDS METALS COMPANY, PETITIONER,

v.

HAROLD BROWN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 564 F. 2d 663. The opinion of the district court (Pet. App. B) is reported at 417 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1977. A petition for rehearing (Pet. App. C) was denied on December 5, 1977, and the petition for a writ of certiorari was filed on February 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Memorandum of Understanding, by which the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs agreed to share information and coordinate their efforts, constitutes an unlawful cross-delegation of enforcement authority.

2. Whether the Memorandum of Understanding violates limitations on the investigatory authority of the Equal Employment Opportunity Commission.

3. Whether the Memorandum of Understanding is invalid because it was not published for comment before it became effective.

STATEMENT

The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) are both responsible for enforcing federal prohibitions against employment discrimination, although the mandate of the two agencies is significantly different. The EEOC has enforcement responsibilities under Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended 42 U.S.C. (Supp. V) 2000e-5. The Commission endeavors to resolve, through mediation and, if necessary, through litigation, charges of employment discrimination filed by employees or individual Commissioners. The OFCCP, by contrast, is charged with responsibility to enforce Executive Order 11246, as amended, which prohibits federal contractors from engaging in discriminatory employment practices.[1]

[1]The OFCCP has been delegated this responsibility by the Secretary of Labor. The OFCCP in turn delegates certain compliance responsibilities to federal contracting agencies, which are designated as "compliance agencies" for this purpose.

Whereas the EEOC deals with complaints of individuals as well as such systemic discrimination as is reflected in its investigation of particular charges, the OFCCP is primarily concerned with contractors' general employment policies and practices.

Because their spheres of responsibility are related, and in some respects overlapping, the EEOC and the OFCCP have long shared information with respect to discrimination by private employers. Prior to 1970, they shared information on an informal basis. On May 20, 1970, the Commission and the OFCCP formalized these practices in a Memorandum of Understanding that established procedures for the exchange of information between the two agencies. 35 Fed. Reg. 8461.

When Congress amended Title VII in 1972, it expressed the hope that the agencies responsible for eliminating discrimination in employment would be able to coordinate their efforts. Congress cited the 1970 Memorandum of Understanding with apparent approval, although it expressed dissatisfaction with the way it had been implemented. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 15 (1971).

Responding to this concern, the EEOC and the OFCCP executed a new Memorandum of Understanding on September 11, 1974. 39 Fed. Reg. 35855. In pertinent part, the Memorandum provided that the EEOC and the OFCCP would exchange information concerning employers' compliance with laws and regulations forbidding discrimination, and that individual complaints filed with the OFCCP would be deemed filed with the EEOC and would promptly be transmitted by the OFCCP to the appropriate EEOC district office (Pet. App. 3a).

On March 9, 1976, an EEOC Commissioner's charge was filed against petitioner, alleging that the company was engaged in a pattern or practice of discrimination against women and Blacks at its Sheffield, Alabama, facilities. Pursuant to the Memorandum of Understanding, the EEOC subsequently requested information relating to petitioner's employment practices at that plant from the Defense Supply Agency (DSA), which was acting as a "compliance agency" for the OFCCP (C.A. App. 128-129).

After petitioner was informed about this request for information, petitioner filed suit in the United States District Court for the Eastern District of Virginia to enjoin DSA from complying with the request. Petitioner alleged that the Memorandum of Understanding was unlawful, and that any actions taken under the authority of that memorandum were improper and in violation of its rights (Pet. App. 13a-15a).

On cross-motions for summary judgment, the district court upheld the provisions of paragraphs one through nine of the Memorandum, which concerned the sharing of information and cooperation between the agencies. The court, however, ruled that paragraph 10 of the Memorandum, which provided for the transfer of complaints from the OFCCP to the EEOC, should have been promulgated only after satisfying the notice and comment requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. Accordingly, the district court enjoined the agencies from following the policy set out in paragraph 10 (Pet. App. 26a). The court of appeals held the Memorandum valid against all challenges, affirming the portions of the district court's judgment that upheld paragraphs one through nine of the Memorandum and reversing the portion that held paragraph 10 unlawful.

The court of appeals ruled that cooperation among the agencies was permissible and that paragraph 10 violated neither Title VII nor the Administrative Procedure Act (Pet. App. 1a-12a).

ARGUMENT

1. Petitioner first contends (Pet. 8-11) that the Memorandum of Understanding constitutes an impermissible cross-delegation of investigative, prosecutorial, and administrative responsibilities between the OFCCP and EEOC. We disagree.

Contrary to petitioner's suggestion, the EEOC has not assumed enforcement of the Executive Order nor has the OFCCP assumed enforcement of Title VII. Just the opposite, the OFCCP entered into the Memorandum of Understanding in part so that individual claims of discrimination that were more properly cognizable under Title VII than under the Executive Order could be passed on to the EEOC, the agency charged with responsibility for enforcing that statute. Rather than erecting an impermissible system of cross-delegation of authority, the Memorandum of Understanding simply permits the two agencies to cooperate and to coordinate their efforts so as to avoid duplication.[2]

Paragraph nine of the Memorandum, to which petitioner objects, provides that the OFCCP and the EEOC will notify each other before investigating pending charges to determine whether the other agency has outstanding charges against the same respondent. If so, the two agencies will coordinate their investigative efforts,

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[2]Both the EEOC and the OFCCP are specifically authorized to cooperate with other agencies. See 42 U.S.C. (and Supp. V) 2000e-4(g)(1); Executive Order 11246, Sections 207, 209(a); *cf.* 41 C.F.R. 60-1.43.

and if systemtic discrimination is alleged, joint conciliation will be attempted. Through this provision, the two agencies have sought to avoid the waste and confusion of conciliating the same claim twice, once under the terms of Title VII and again under the provisions of Executive Order 11246. The Memorandum in no way alters the EEOC's statutory responsibility for enforcing Title VII or the OFCCP's responsibility for enforcing the Executive Order.

Paragraph seven of the Memorandum also provides for coordinated enforcement efforts between the agencies. Under that paragraph, if the OFCCP begins debarment proceedings against a contractor, it will include in the proceeding any charges of systemic discrimination relevant to that proceeding that may have been filed against that contractor with the EEOC. Similarly, if the EEOC commences litigation against a government contractor, paragraph seven provides that the agency will include matters relevant to the Title VII charge that may have been presented to the OFCCP or one of its compliance agencies. Again, the paragraph does not in any way effect a transfer of enforcement authority from one agency to the other. The OFCCP retains the authority to enforce the Executive Order, by considering charges brought to its attention, including relevant information received from the EEOC, while the EEOC retains similar enforcement authority with respect to Title VII charges, by considering information developed in its own investigations as well as relevant information provided by the OFCCP.

Paragraph 10 of the memorandum similarly does not operate as a "cross-delegation," device, but simply provides that OFCCP will receive and transmit misdirected individual complaints to the EEOC. Because of its focus on eliminating systemic discrimination, the

OFCCP is not well suited to investigate and resolve isolated charges of discriminatory action. The sanctions available to the OFCCP through the Executive Order—terminating a contract or prohibiting a contractor from bidding on future government contracts—reflect the systemic nature of the OFCCP's concerns and its unsuitability for remedying isolated instances of discrimination. Indeed, the Executive Order itself contemplates that the OFCCP will cooperate with the EEOC and the Justice Department in recommending that Title VII proceedings be instituted in appropriate cases. Executive Order 11246, Section 209(a)(3). See also, Section 207. Accordingly, OFCCP's agreement to forward individual complaints to the EEOC does not constitute an abandonment of administrative responsibility, but rather a proper recognition of differences in function of two agencies in a closely related sphere of concern.[3]

2. Petitioner next argues (Pet. 11-16) that the Memorandum of Understanding allows the EEOC to avoid statutory restrictions on its investigative powers. Specifically, petitioner contends that the Memorandum allows the EEOC to secure information that it could not subpoena directly from the company because of limitations on the agency's subpoena powers in Sections 709 and 710 of Title VII, 42 U.S.C. (and Supp. V) 2000e-8 and 2000e-9. Both the court of appeals and the district court rejected this claim, noting that when the EEOC investigates a charge, it is not limited to gathering

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[3]The provision that a complaint filed with the OFCCP is deemed filed with the EEOC at that time has been judicially approved. See *Egelston* v. *State University College at Geneseo*, 535 F. 2d 752, 755 n. 4 (C.A. 2); *Equal Employment Opportunity Commission* v. *Collator Co.*, 7 F.E.P. Cas. 1258 (C.A. 9), reversing 7 F.E.P. Cas. 934 (W.D. Wash.).

information only from the respondent (Pet. App. 5a, 25a). Any restrictions imposed on the EEOC's information-gathering authority by Section 709(a) or Section 710 apply only to the agency's power to compel production, not to information volunteered by other agencies, by third parties, or even by respondents.

Petitioner also attacks the Memorandum on the ground that it allows the Commission to circumvent Section 709(c) of Title VII, 42 U.S.C. (and Supp. V) 2000e-8(c), which requires the EEOC to hold public hearings before imposing new reporting requirements on employers. As both courts below noted, however, the Memorandum does not impose any new reporting requirement at all. It merely gives effect to the OFCCP's regulations, which have long provided that material obtained by that agency from contractors can be used in Title VII enforcement actions (Pet. App. 5a, 24a). 41 C.F.R. 60-1.7, 60-1.43.

3. Finally, petitioner contends that the Memorandum of Understanding should have been promulgated, if at all, only after first being published for notice and comment in accordance with 5 U.S.C. 553(a).[4] That Section of the Administrative Procedure Act, however, applies only to rules or regulations having a substantive impact on outside parties, not to mere statements of agency policy or procedure. *Pickus* v. *United States Board of Parole,* 507 F. 2d 1107, 1112 (C.A.D.C.); *Texaco, Inc.* v. *Federal Power Commission,* 412 F. 2d 740, 744 (C.A. 3); *Carpenters 46 County Conference Board* v. *Construction Industry Stablization Committee,* 393 F. Supp. 480, 493 (N.D. Cal.). As the court of appeals properly

[4]The Memorandum was treated as a rule within the meaning of 5 U.S.C. 551(4) and was published in the Federal Register in accordance with 5 U.S.C. 552(1).

concluded, the Memorandum of Understanding did not have a substantive impact on the rights and duties of employers in general or of petitioner in particular. It was therefore not a substantive rule and accordingly not subject to the notice and comment requirements of 5 U.S.C. 553(a). See *Equal Employment Opportunity Commission* v. *Raymond Metal Products Co.,* 530 F. 2d 590 (C.A. 4).

Paragraph 10 was the only portion of the Memorandum that the district court concluded has a sufficient impact on petitioner to be deemed a substantive rule, and the court of appeals concluded that even that paragraph has no substantive impact on petitioner because it neither diminishes nor increases the company's rights and duties under the Executive Order or Title VII, but "simply provides an expeditious means of transmitting to the commission complaints that should have been mailed to it in the first place" (Pet. App. 10a-11a). In any event, the question of the propriety of paragraph 10 under the Administrative Procedure Act is of no continuing importance since, after the district court's decision, the OFCCP issued regulations permitting it to transmit appropriate complaints to the EEOC. 42 Fed. Reg. 3454. Those regulations were issued in full compliance with the requirements of 5 U.S.C. 553.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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